IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

ROBERT K. CORBIN
Attorney General

By IAN A. MACPHERSON
Assistant Attorney General
338 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

ROBERT K. CORBIN
Attorney General

By IAN A. MACPHERSON
Assistant Attorney General
338 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondents

TABLE OF CONTENTS

Cases--Continued PAGE

Cases--Continued PAGE

STATUTES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

I
THE STATE TAXES IN QUESTION
HAVE NOT BEEN PREEMPTED
BY FEDERAL LAW

The initial argument advanced by the Petitioners is that 25 U.S.C. §§ 196, 406 and 407 (1976) and 25 C.F.R. §§ 141 and 142 preempt the application of the state tax laws in question (i.e., A.R.S. §§

28-1552 and 40-641). The contention of the Petitioners is that these statutes and regulations exclusively govern all aspects of the timbering operations of the Fort Apache Timber Company ("FATCO"), thereby ousting the state from imposing its taxes upon an independent logging contractor, Pinetop Logging Company ("Pinetop"), a non-Indian entity with which FATCO had contracted for certain logging and hauling services.

At the outset it must be remembered that the Petitioners herein are composed of two legally distinct and separate entities. One entity is the White Mountain Apache Tribe of Indians, which Indian tribe created the tribal business enterprise, FATCO. The other entity is an independent logging contractor operation composed of two non-Indian Oregon corporations doing business jointly as Pinetop Logging Company. The state taxes in

question are neither imposed nor are they sought to be imposed upon either the White Mountain Apache Tribe or FATCO; on the contrary, the only taxpayers in this dispute are the non-Indian Oregon corporations, E. H. Loveness Lumber Sales Co. and Basin Building Materials Co., doing business jointly herein as Pinetop.

Accordingly, the pertinent inquiry becomes: do the federal statutes and regulations cited by the Petitioners clearly evince a congressional or federal executive intent to forbid the imposition of state taxes upon non-Indian independent logging contractors who have agreed with an Indian tribal timbering operation to perform certain services for it? It is the Respondents' position that numerous decisions of this Court require the conclusion that the state laws in question are not preempted even if it be assumed that the economic burdens of the taxes in

question -- as distinguished from their legal incidence -- are eventually borne by the Indian entity herein.

To begin with, the statutes relied upon by the Petitioners deal with the sale or other disposition of dead timber (25 U.S.C. § 196) and the sale of timber on Indian trust allotments (25 U.S.C. § 406) and on unallotted lands (25 U.S.C. § 407). The C.F.R. provisions, in turn, concern general forest regulations (25 C.F.R. § 141) and the sale of lumber and other forest products produced by Indian enterprises from the forests on Indian reservations (25 C.F.R. § 142).

Although the Petitioners point to these provisions as being the source of their preemption argument, they offer little more than generalized assertions that the federal scheme prohibits the state laws in question. The thrust of

their arguments appears to be that, since the laws and regulations seek to protect the forests on Indian reservations to foster sustained yields, state laws which could in any way affect that objective, directly or indirectly, must be prohibited.

The Respondents respectfully disagree. As pointed out in the lower court's opinion herein (Petition, Appendix at 30a-1 -- 31a), the federal laws upon which the Petitioners rely do not seek to exclusively control the licensing of non-Indian independent contractors such as Pinetop, do not seek to directly regulate the prices charged for services such as Pinetop renders (although the contracts are subject to federal approval) nor do they seek to tax the operations of non-Indian contractors such as Pinetop. In short, the federal scheme

preempts an area other than that to which the state laws in question are sought to be applied. Thus, these state tax laws should be permitted continued operation in the absence of a clear and affirmative manifestation by the Congress of an intention to prohibit them. DeCanas v. Bica, 424 U.S. 351, 357 (1976); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware 414 U.S. 117, 139 (1973); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 (1963); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956); Schwartz v. Texas, 344 U.S. 199, 203 (1952).

Therefore, the cornerstone of the Petitioners' preemption argument -- Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) -- is not controlling in this case. There, this

Court found that the federal regulatory scheme under 25 U.S.C. §§ 261 et seq. and 25 C.F.R. §§ 251.1 et seq. was so all-pervasive that those engaged in the business of Indian trading on an Indian reservation could not be subjected to Arizona's transaction privilege tax. Nothing in the Warren Trading Post decision, supra, suggests, however, that since the licensed Indian trader itself was subjected to preemptive federal regulation, non-Indians with whom the trader contractually dealt were similarly immune from the application of state laws which affected them alone. It was the business of Indian trading on Indian reservations that constituted the preempted area and not the entire area of state taxation of non-Indians vis a vis their own independent activities thereon.

This point has been made clear in subsequent decisions of this Court, chief among which is Moe v. Confederated Salish

and Kootenai Tribes, 425 U.S. 463 (1976). There, this Court held, inter alia, that the State of Montana could impose its cigarette tax -- the legal incidence of which was upon the vendee -- upon sales by an Indian "smoke shop" operator to non-Indian consumers of the cigarettes. This ruling was reached in spite of the Indians' assertions that the entire area had been preempted under the rationale of the Warren Trading Post case, supra, and that the adverse economic effects occasioned by a state "precollection" requirement not only violated that rationale, but constituted in addition a frustration of and interference with tribal self-government under Williams v. Lee, 358 U.S. 217 (1959).

In rejecting that contention, this Court correctly observed that in the Warren Trading Post case, supra, there

was no claim made that the Arizona tax could not be applied to on-reservation transactions between the licensed Indian trader and non-Indians. See 425 U.S. at 482; 380 U.S. at 686 n.1. This is a relevant point, for it acknowledges that even where there has purportedly been a complete and absolute preemption of an area (e.g., engaging in the business of Indian trading on an Indian reservation), activities not clearly embraced within the excluded area continue to be subjected to state laws (e.g., taxation of a licensed Indian trader with respect to his transactions with non-Indians), even though this might in some way affect the preempted area.

This conclusion was also reached by the United States Solicitor's Office of the Department of the Interior in two opinions cited with approval by this Court in the Warren Trading Post case,

supra, 57 I.D. 124 and 58 I.D. 562. See 380 U.S. at 690 nn. 15, 16.

In point of fact, 57 I.D. 124 states at 126:

> "...[W]hite traders in their dealings with non-Indians must comply with the State laws, including those imposing sales taxes. ...Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians."
>
> (Emphasis added.)

Accordingly, the question of whether or not, as the Petitioners argue, the federal Indian timber regulatory scheme is so all-pervasive as to exclude the application of the state taxes herein is not as easily answered as the Petitioners would suggest. Clearly, while there is a federal objective of fostering and promoting Indian forestry programs, such an

objective is neither frustrated nor impeded by permitting the continued application of the state taxes in question to the operations of the non-Indian taxpayer herein, Pinetop Logging Co.

Indeed, the Moe and Warren Trading Post decisions, supra, have acknowledged the applicability of state sales taxes to on-reservation transactions between a federally licensed Indian trader and non-Indians. In so doing, it is the Respondents' position that this Court continues to recognize the necessity of examining not only the scope of the subject area allegedly being preempted, but also, insofar as state taxation is concerned, the distinction between the legal incidence of a tax and the ultimate resting place of its economic burden.

In this regard, the lower court's reliance upon this Court's decision in Commonwealth of Pennsylvania v. Nelson,

supra, is entirely proper. In addition, although the lower court cited the decision in its discussion of other aspects of the case, the holding in Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed (for want of substantial federal question) 411 U.S. 941 (1973)[1] is relevant on the preemption issue.

In the Kahn case, supra, this Court's dismissal for want of a substantial federal question constituted both a ruling on the merits, Hicks v. Miranda, 422 U.S. 332 (1975), and a view of this Court that the judgment appealed from was correct as

---

1. It should be noted that the dismissal occurred on April 23, 1973, nearly one month after March 27, 1973, the date when this Court handed down its decisions in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) & McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). These cases, therefore, may reasonably be presumed to have been fresh in the Court's mind when the Kahns' appeal was dismissed.

to those federal questions raised and necessary to the decision, State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, ___ U.S. __, __ S.Ct. __ (47 U.S.L.W. 4111, 4115 n. 20, Jan. 16, 1979). Apart from the question of the precedential weight to be accorded the Kahn decision, supra, the dissent of Mr. Justice Douglas, in which Mr. Justice Brennan concurred, 411 U.S. at 941-944, is enlightening.

In the lower court, the Kahn non-Indian marital community argued, among other things, that since Mr. Kahn earned all of his income as an attorney for the Navajo Tribe of Indians and was thus subject to assertedly all-pervasive statutes and the rules and regulations of the U.S. Secretary of the Interior, federal law had thus preempted the imposition of Arizona's income tax upon him. Justices

Douglas and Brennan dissented from the summary dismissal and argued that probable jurisdiction should have been noted and that full argument and briefing should have been permitted.

The basis for the dissent was that Mr. Kahn's employment was controlled by 25 U.S.C. § 81 (governing contracts with Indian tribes or Indians) and was subject to extensive and comprehensive regulation by the U.S. Secretary of the Interior under 25 C.F.R. §§ 72.1--72.25 (regulating contracts between attorneys and Indian tribes). Constructing an analogy between 25 U.S.C. § 81 and 25 C.F.R. §§ 72.1-- 72.25, and the preemptive regulatory scheme found in the Warren Trading Post case, supra, the dissent argued that similar policy considerations should control in Mr. Kahn's situation. A majority of this Court nevertheless ruled that no

substantial federal question had been presented with respect to any of the issues raised by the appeal, including the contention that the federal statutes and regulations preempted the application of the state tax to the non-Indian, Edmund D. Kahn.

It is therefore the position of the Respondents herein that the Petitioners have failed to demonstrate that the statutes and regulations heretofore cited by them preempt the state tax laws in question. Moreover, the Petitioners have thus also failed to show that the lower court's ruling on the federal question of substance has not heretofore been determined by this Court or that the lower court's ruling was probably not in accord with applicable decisions of this Court within the meaning of 28 U.S.C., U.S. Supreme Court Rule 19(1)(a).

On the contrary, the Respondents view

the holdings in the Moe and Kahn decisions, supra, and in particular the basis of the dissent in the dismissal of the Kahn case, supra, as persuasive authority for the position that the substantive legal question -- the purported preemption of state tax laws imposed upon non-Indians who contract with on-reservation Indian tribes or individual Indians -- has been heretofore considered by this Court and resolved in favor of the application of the state law.

Furthermore, the Respondents believe that the lower court decision has properly considered the substantive question against a background of numerous federal decisions on point and has rendered a decision that is clearly in accord with applicable decisions of this Court. See, e.g., Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied 430 U.S. 983 (1977);

Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied 405 U.S. 933 (1972), rehrg. denied 405 U.S. 1033 (1972), motion for leave to file second petition for rehearing denied 409 U.S. 901 (1972); cf. Mescalero Apache Tribe v. O'Cheskey, 439 F.Supp. 1063 (D.N.M. 1977),[2] wherein it was held that non-Indian contractors building a resort complex for an Indian tribe on its reservation were subject to the New Mexico gross receipts tax over the contention that federal law governing the regulation of traders preempted the area and that tribal business licensing and tax ordinances further precluded the state taxes. The district court, citing, among others,

2. Appeals pending in the U.S. Court of Appeals for the Tenth Circuit, Cause Nos. 77-2102 and 77-2103, oral argument scheduled for March 16, 1979.

the Moe, Fort Mojave and Agua Caliente decisions, supra, rejected the notions that the state taxes had been preempted and that the economic burdens of the taxes borne by the Indians infringed upon their rights of self-government.[3]

With regard to the Petitioners' reliance upon the decision in Humboldt Fir, Inc. v. United States, 426 F.Supp. 292 (D.Cal. 1977) (Petition at 15 n.7), the reliance is misplaced. There, the district court held that the United States could file a claim in bankruptcy on behalf of the Hoopa Valley Indian Tribe to recover against the bankrupt estate of Humboldt Fir, Inc., for the breach of a timber sale contract. While the court

3. The economic burdens of the non-Indians' taxes were borne by the Indians pursuant to contractual agreement and not by mandate of state law, it should be noted. See 439 F.Supp. at 1066.

held that the federal law of contracts applied to the agreement between the tribe and the bankrupt, it did not rule that the type of preemption advocated by the Petitioners herein resulted. The court held, 426 F.Supp. at 296-298, that both federal law (25 U.S.C. §§ 406, 407) and California state law (California Commercial Code, i.e. West's Ann. Cal. Codes, Commercial §§ 1101 et seq.) were relevant to the inquiry into whether the Indian tribe had reasonably relied upon the bankrupt's repudiation of the contract under U.C.C. § 2-609.4 and to an examination of the effect of the bankrupt's failure to avail itself of available administrative appeal rights under 25 C.F.R. §§ 2.2, 2.3 and 141.23.

The Respondents herein would respectfully submit that the policy considerations underlying the rights of an Indian tribe seeking damages from a bankrupt for

breach of a timber sale contract bear little relevance to the instant controversy. The present dispute concerns the application of state tax laws to non-Indians who have entered with Indians into presumably valid, binding, federally-approved contracts that are not being breached, but are being performed according to their terms.

The holding in the Humboldt Fir case, supra, establishes that a non-Indian bankrupt may not manipulate state commercial law to the detriment of an Indian tribe otherwise in compliance with applicable federal and state laws. It does not hold, as Petitioners seem to suggest, that a complete ouster of state laws, including tax laws, is required under 25 U.S.C. §§ 406 or 407 or 25 C.F.R. §§ 2.2, 2.3 or 141.23. If such a result were intended, the district court judge would not have had occasion to discuss in

detail, as he did, the provisions of the Uniform Commercial Code, particularly with respect to the circumstances which justified a conclusion that the bankrupt had repudiated the contract.

As for the Petitioners' reliance upon the decisions cited in note 8, page 19 of the Petition, the Respondents would respectfully submit that each is distinguishable from the present dispute. For example, in Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F.Supp. 1339, 1371 (D. Wash. 1978), the court held, inter alia, that where an Indian tribe possessed the power to impose a sales tax on transactions other than cigarette sales (which were taxed under a tribal cigarette tax ordinance) between Indian vendors and non-Indian vendees, but had not actually imposed such a tax, the state's power to tax was not preempted. In the present

case, there is no suggestion that, as in the Colville decision, supra, an Indian tribal tax code touching upon the same subject matter has been enacted and actually put into operation.

To be sure, while it is the Respondents' position that, under the decisions in the Fort Mojave and Agua Caliente cases, supra, the result reached in the Colville case, supra, with respect to state taxation of cigarette sales to non-Indians is questionable under this court's decision in the Moe case, supra, the fact remains that no conflicting or purportedly preemptive tribal tax exists herein. Thus, the Colville decision, supra, is of limited assistance to the resolution of the question.[4]

---

4. The Colville decision, supra, is presently pending on appeal in the U.S. Supreme Court, Docket No. 78-630.

In Santa Rosa Band of Mission Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977), the court concluded that county zoning ordinances could not co-exist with the federal policy that the states (and their political subdivisions) had no power to regulate the Indian use or governance of reservation lands except as specifically declared by Congress. Notably, the court cited (532 F.2d at 658 n.2) the decision in McClanahan v. Arizona State Tax Commission, supra, and interpreted it to mean

> " ...that states may not regulate or tax Indian use of the reservation absent Federal consent. The Court [in McClanahan, supra,] distinguished state efforts to regulate off-reservation Indian activities, or reservation activities of non-Indians, from state efforts to tax or regulate Indian use of the reservation, holding the latter preempted by the grant of the reservation." (Emphasis added.)

In the McClanahan decision, supra, this Court specifically narrowed its

ruling to the issue of the applicability of a state tax directly imposed upon a tribal member residing on her own reservation and earning all of her income thereon. It was also recognized that, under decisions such as Thomas v. Gay, 169 U.S. 264 (1898) and Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885), this Court was not extending its examination to exertions of state sovereignty over non-Indians who undertake activity on Indian reservations.

Finally, the Petitioners' reliance upon Confederated Tribes of the Colville Indian Reservation v. State of Washington, 412 F.Supp. 651 (E.D. Wash. 1976) is misplaced, for the ruling is distinguishable from the present case. There, the State of Washington was attempting to regulate the precise activity of non-Indians sought to be governed by tribal ordinances, viz. hunting and fishing on

an Indian reservation. Such a fact situation is clearly lacking in the present case. Moreover, an opposite conclusion was reached (i.e., permitting the application of state hunting and fishing laws to non-Indians on Indian reservations) in People of the State of California v. Quechan Tribe of Indians, 424 F.Supp. 969 (D.Cal. 1977)[5] and, notably, White Mountain Apache Tribe v. State of Arizona, No. CIV 77-867 PHX-WPC (D. Ariz., June 13, 1978).[6]

It is therefore the position of the Respondents that the state taxes here in question are properly applied to the non-Indian independent logging contractor, Pinetop Logging Company, and have not been shown to have been preempted.

---

5. Appeal pending in the U.S. Court of Appeals for the Ninth Circuit, Docket No. CIV 77-1500, oral argument held January 11, 1979.

6. Appeal pending in the U.S. Court of Appeals for the Ninth Circuit, Docket No. CIV 78-3427.

Neither Congress nor the executive branch has acted in the clear and manifest fashion required to support the conclusion of preemption advocated by the Petitioners. Thus, upon the foregoing authorites, the Petitioners' preemption argument should fail and the petition for certiorari should be denied.

II

THE ARIZONA ENABLING ACT DOES NOT PROHIBIT THE STATE TAXES IN QUESTION

The second argument offered by the Petitioners is that Arizona's Enabling Act, 36 Stat. 557, 560, § 20 (Petition, Appendix at 43a - 44a) forbids the imposition of the taxes herein upon Pinetop.

The answer to this contention is that the lower court correctly held that the disclaimer language contained in the Act operates as a disclaimer of property interest rather than a relinquishment of all jurisdiction over persons and activi-

ties, of whatever nature, on an Indian reservation. Rather than being in conflict with the decisions of this Court, as suggested by the Petitioners, the conclusion is clearly correct with respect to state exertions of jurisdiction over non-Indians and their activities on Indian reservations. See Moe v. Confederated Salish and Kootenai Tribes, supra, 411 U.S. at 481 - 483; Kahn v. Arizona State Tax Commission, supra, 411 U.S. at 941 - 944; Thomas v. Gay, supra. See also Truscott v. Hurlbut Land & Cattle Co., 73 F. 60 (9th Cir. 1896); Mescalero Apache Tribe v. O'Cheskey, supra; Arizona Department of Revenue v. Hane Construction Co., 115 Ariz. 243, 564 P.2d 932 (Ct.App. 1977); G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 227 (1976); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975). Cf. Organized Village

of Kake v. Egan, 369 U.S. 60 (1962).

The Petitioners seek to characterize the state taxes herein as constituting a direct regulation of and burden upon tribal lands. The Petitioners' reliance in this regard upon the McClanahan decision, supra, and the discussion of the Arizona Enabling Act therein (411 U.S. at 175-176) is particularly inapposite. This Court made it clear that its ruling, in view of the Act, was reached upon the grounds that the legal incidence of the state tax there in question was sought to be imposed not upon a non-Indian on the reservation (cf. Kahn v. Arizona State Tax Commission, supra) but directly upon an enrolled Indian member of the Navajo Tribe.

The Petitioners' argument that the disclaimer of "absolute jurisdiction and control" over Indian lands in the Act requires the invalidation of the taxes

herein is a plain non sequitur: the taxes in question do not seek to regulate or control any Indian lands whatsoever. They seek only to tax the operations of a non-Indian entity which has entered into a contract with an Indian tribe to perform services on the tribe's reservation within the State of Arizona. Neither of the taxes herein is a property tax nor does either tax relate to Indian lands.

As the lower court pointed out (Petition, Appendix at 28a-1 -- 29a), insofar as the Arizona Enabling Act is concerned, it is as immaterial that Pinetop's business activities are conducted on an Indian reservation as it would be were they conducted on national forest lands. Wilson v. Cook, 327 U.S. 474 (1946).

Thus, the Petitioners' contention that Arizona's Enabling Act prohibits the taxes is legally unsound and should result in the rejection of the contention and the denial of the petition for certiorari.

III

25 C.F.R. § 1.4 DOES NOT PROHIBIT THE STATE TAXES HERE IN QUESTION

The Petitioners' next argue that 25 C.F.R. § 1.4 (Petition, Appendix at 44a -- 45a) prohibits the subject taxes. The Petitioners misconstrue the regulation at the outset by urging that the taxes herein constitute "...laws ...governing, regulating or controlling the use or development of...real or personal property..." within the purview of the regulation.

It is the Respondents' position that the lower court correctly ruled that 25 C.F.R. § 1.4 did not operate to oust the state taxes herein as levied upon Pinetop's activities. In addition, the Respondents would point out that several commentators have suggested that 25 C.F.R. § 1.4 is invalid for want of spe-

cific statutory authorization[7] and at least two district courts have refused to apply it for that reason. See Norvell v. Sangre De Cristo Development Co., Inc., 372 F.Supp. 348 (D.N.M. 1974), rev'd on other grounds[8] 519 F.2d 370 (10th Cir. 1975); Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (D. Cal. 1971), rev'd on other grounds, 495

---

7. C. Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 U.C.L.A. Law Rev. 535, 586 n. 229; M. Price, "Law and the American Indian," 290-293 (1973 ed.)

8. Of interest in this regard is the Court of Appeals' footnote 2, 519 F.2d at 373:

> "25 C.F.R. § 1.4 authorizes the Secretary of the Interior to adopt particular State statutes, codes, regulations, rules or other regulations in order to provide complementary leasing of Indian land with adjacent State land."
>
> (Emphasis added.)

There is thus no suggestion as a result of the reversal that an intent to oust state taxation of non-Indians is embraced in 25 C.F.R. § 1.4.

F.2d 1 (9th Cir. 1974), cert. denied 419 U.S. 1008 (1974).

In spite of these authorities, the Court of Appeals for the Ninth Circuit has ruled that 25 C.F.R. § 1.4 is valid and operated to prevent the application of Kings County, California zoning ordinances and building codes on the Santa Rosa Rancheria, an Indian reservation. Santa Rosa Band of Mission Indians v. Kings County, supra. Since the case involved a direct attempt by the state authorities to regulate Indian use of Indian trust lands (i.e., two individual Indians could not, without complying with certain county ordinances, place their mobile homes (purchased with federal approval) on their lots), the ruling is less than surprising.

The relevance of the decision, however, lies in an examination of its analysis of 25 C.F.R. § 1.4 vis a vis state

laws other than those dealing with land use and zoning. While the court held that the county ordinances there in question would constitute an "encumbrance" upon reservation trust lands and were thus prohibited not only by 25 C.F.R. § 1.4 but also by 28 U.S.C. § 1360(b) (California being a "P.L. 280" state), it specifically negated any inference that its ruling could be extended to the extent advocated by the Petitioners in the case sub judice. The court stated, 532 F.2d at 667 n.20:

> "We need not decide the full dimensions of the 'no encumbrance to trust property' exception, as we are certain in any event that the regulation's proscription of the local zoning ordinances involved here falls well within it, and is hence not in derogation of the statutory grant. Nevertheless, it has been suggested that the word

> "encumbrance" might be interpreted so broadly as to eliminate state regulation of all activity occurring on trust property. See Goldberg, at 587. We note that 25 C.F.R. § 1.4 is conceivably subject to the same objection. As we read "encumbrance," it is directed, consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only incidentally involve the property. See Rincon, supra, at 376-377. However, the full dimensions of the statutory exception, and the validity of 25 C.F.R. § 1.4 when asserted in other contexts as a bar to state jurisdiction, must await determination on a case-by-case basis." (Emphasis added.)

The Respondents herein would respectfully submit that the decision in Fort Mojave Tribe v. County of San Bernardino, supra, which reaffirmed the reasoning of Agua Caliente Band of Mission Indians v. County of Riverside, supra, is precisely the type of "case-by-case" analysis to which the court in the Santa Rosa case, supra, was referring. In point of fact,

at the time that the Agua Caliente case, supra, was decided in the district court (i.e., 1969), 25 C.F.R. § 1.4 had been promulgated and had been adopted and made applicable to those portions of the Agua Caliente Indian Reservation situated within the city limits of Palm Springs, California. See M. Price, supra at 291. Indeed, although it does not appear in the reported decisions, the Agua Caliente Band specifically argued, as do the Petitioners herein, that 25 C.F.R. § 1.4 preempted the California possessory interest tax (California Revenue and Tax Code § 107) levied upon non-Indian lessees of tribal lands. [9]

---

9. See Brief of Appellee at 41-43, United States Court of Appeals for the Ninth Circuit, Cause No. 25298, the Agua Caliente Band of Mission Indians, et al. v. The County of Riverside.

If 25 C.F.R. § 1.4 operated to oust the states from jurisdiction to tax non-Indians with respect to their business activities on Indian reservations, one would assume that the U.S. Court of Appeals for the Ninth Circuit would not, after rendering in 1975 its decision in the Santa Rosa case, supra, have upheld the California possessory interest tax (California Revenue and Tax Code § 107) as imposed upon the non-Indian lessees in its Fort Mojave decision, supra, handed down in 1977. The more reasonable conclusion to be drawn, therefore, is that, as the court observed in its footnote 20 in the Santa Rosa decision, supra, while 25 C.F.R. § 1.4 preempts conflicting state and county land use and zoning regulations, the intent of the regulation, insofar as it forbids "encumbrances" in a way similar to that of 28 U.S.C. § 1360(b), "...does not encom-

pass regulations of activity which only incidentally involve the property."

In this regard, it was held in Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127 (D.Alas. 1978) that 25 C.F.R. § 1.4 would not prohibit the application of state tort law to permit a suit by the owner of an aircraft which was damaged when it hit a snow berm at an airport owned and operated by an Indian community corporation if the Indian corporation, as distinguished from the Metlakatla Indian Community itself, could be shown to be the actual owner and operator of the airport. The court denied both the Indians' and the aircraft owner's motions for summary judgment on the grounds that fact questions surrounding the actual operation of the airport precluded such a procedure.

Yet, the court's holding, 451 F.Supp. at 1141, that the action could have been

maintained in state court and that the imposition of tort liability would not fall within the ambit of the area preempted by 25 C.F.R. § 1.4 clearly supports the Respondents' position herein. Quite simply, 25 C.F.R. § 1.4 is devoid of any provision which manifests even a vague executive intent to preempt the application of the state taxes herein to the non-Indian logging company, Pinetop. On the contrary, the decisions in the Santa Rosa, Fort Mojave and Agua Caliente decisions, supra, support just the opposite conclusion.

For these reasons, the Petitioners' third argument should be rejected and the petition for certiorari should be denied.

IV

THE STATE TAXES HEREIN DO NOT INFRINGE UPON THE TRIBAL GOVERNMENT

The Petitioners' final argument asserts that the state taxes herein infringe upon the right of tribal self-government under the rationale of Williams v. Lee, supra. There is a simple answer to this contention: they do not.

To begin with, the Petitioners characterize the lower court's synopsis of Pinetop's position (Petition, Appendix at 31a -- 31a-1) as an "acknowledgment" of specific impairments of governmental freedoms claimed by the White Mountain Apache Tribe (Petition at 33). The lower court did nothing more than describe the Indians' claims and correctly concluded that the purported interferences were "...more imaginary than real." (Petition, Appendix at 31a). In reality, the Petitioners' arguments in this regard run

counter to the great weight of authority on point.

For example, this Court specifically ruled in the Moe decision, supra at 483, that the Montana requirement that the Indian tribal cigarette vendor "precollect" the state tax with respect to his sales to non-Indians (who bore the legal incidence of the tax) did not constitute the type of burden which would frustrate tribal self-government under Williams v. Lee, supra, or run afoul of any congressional enactment dealing with the affairs of reservation Indians, citing United States v. McGowan, 302 U.S. 535 (1938) and Thomas v. Gay, supra. This rationale is clearly correct as applied in cases which by now are quite familiar herein. See, e.g. Kahn v. Arizona State Tax Commission, supra; Fort Mojave Tribe v. County of San Bernardino, supra; Agua Caliente Band of Mission Indians v.

County of Riverside, supra; Mescalero Apache Tribe v. O'Cheskey, supra.

The fact that the economic burdens of a state tax may in some way affect an Indian or an Indian tribe on its reservation does not, without more, compel the conclusion that the state tax is invalid. In Makah Indian Tribe v. Tax Commission, 72 Wash.2d 613, 434 P.2d 580, (1967), appeal dismissed (for want of substantial federal question) 393 U.S. 8 (1968), the Washington Supreme Court held that the fact that a Washington cigarette tax imposed upon non-Indians resulted in an elevation of the cost of the cigarettes when later sold to reservation Indians did not constitute an impermissible intrusion upon Indian commerce. The court stated, 434 P.2d at 581:

> "A statement made in Minot v. Philadelphia, Wilmington and Baltimore Railroad Company et al., 85 U.S. (18 Wall) 206, 232, 21 L.Ed. 888 (1873), referring to the congressional power over interstate commerce, is instructive here.

> 'The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed by this court in a recent case, "Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."'" (Emphasis added.)

The rationale applies with equal force here: simply because the parties to the contract, Pinetop and FATCO, may negotiate the consideration underlying the agreement, including the numerous cost components such as, for example, the economic burdens of the state taxes in question which go into Pinetop's charge, does

not mean that the tax components -- any more than other cost components such as fuel costs, labor expenses and the like -- are an impermissible intrusion upon either Indian commerce or the right of the Indians to make their own laws and be ruled by them. At the very most, the contractual arrangement by which Pinetop agreed to render logging and hauling services to FATCO and, in return, by which FATCO agreed to pay Pinetop, is simply a manifestation of the exercise by FATCO and/or the Indian tribe of the very right of self-government upon which it is contended the state is infringing.

At this juncture, the Petitioners offer that the "anti-infringement" criteria espoused under the McClanahan and Williams cases, supra, is "...meant to protect Indian governments from illness as well as from funerals." (Petition at 35). The thrust of this observation, ap-

parently, is that the increased economic burdens being "shifted" to the tribe pursuant to contract doctrine (as distinguished, it must be noted, from any mandate of state law) are, while relatively insubstantial (cf. "illness" and "funerals"), still impermissible. This result is, again apparently, based upon the premise that, if the state taxes were not imposed upon Pinetop, the cost of Pinetop's services to FATCO would be a few percentage points lower.

This species of argument has been frequently advanced in the past and has been just as frequently rejected, not only in the context of dealings between non-Indians and the "sovereign" Indian tribes, but in situations involving private individuals and the sovereign United States Government. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, supra, Kahn v. Arizona State Tax Commis-

sion, supra; United States v. City of Detroit, 355 U.S. 466 (1958); State of Alabama v. King & Boozer, 314 U.S. 1 (1941); United States v. State of New Mexico, 581 F.2d 803 (10th Cir. 1978); Fort Mojave Tribe v. County of San Bernardino, supra; Agua Caliente Band of Mission Indians v. County of Riverside, supra; Mescalero Apache Tribe v. O'Cheskey, supra; Arizona Department of Revenue v. Hane Construction Co., supra.

If it is the Petitioners' contention that the contract document between Pinetop and FATCO effectuates an impermissible "shifting" of the economic burdens of the state taxes from Pinetop to FATCO, the remedy for such a circumstance is reformation of the contract, not a lawsuit such as the present one. On the other hand, if it is the Petitioners' position that the economic burdens of these taxes are being borne by the Indian entity

FATCO on a strictly voluntary as opposed to a negotiated contract basis, then the result should be governed by Mescalero Apache Tribe v. O'Cheskey, supra.

In summary, the Petitioners have failed to demonstrate the type of concrete interferences with the Indians' rights of self-government to warrant the conclusion that the state taxes herein imposed upon Pinetop are in violation of the principles articulated in Williams v. Lee, supra. Any effect that the taxes may have upon the Indians is not only remote and indirect, it arises not from any mandate of state law but from contract doctrines existing between Pinetop and FATCO. Such a tenuous cause and effect relationship cannot reasonably be said to require invalidation of the taxes herein.

V

CONCLUSION

For all of the foregoing reasons, the Respondents would respectfully submit that this Court should, in the exercise of its discretion, deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted this 23rd day of February, 1979.

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I am the attorney for the Respondents and am a member of the bar of this Court. I hereby certify that I caused three copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari to be hand delivered on February 23, 1979 to:

Neil Vincent Wake
Leo R. Beus
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

All parties required to be served have been served.

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney General